IN THE DISTRICT COURT OF THE VIRGIN ISLANDS

DIVISION OF SAINT CROIX

JOSEPH ARTHUR,

Plaintiff, Civ. No. 2000/034

v.

HOVIC and HOVENSA, L.L.C.,

Defendants.

ORDER GRANTING PLAINTIFF'S MOTION TO AMEND COMPLAINT

THIS MATTER is before the Court on plaintiff's motion to amend his complaint, to add charges related to ongoing discrimination and retaliation on the part of defendants. Defendants have filed an opposition to which plaintiff replied. Defendants oppose the proposed amendment on the ground that it is late, that the continuing violation theory is inapplicable, and that plaintiff has failed to file an EEOC charge regarding the added allegations.

DISCUSSION

Rule 15(a) of the Federal Rules of Civil Procedure allows a party to amend its complaint, and the court to grant such leave "when justice so requires." Granting or denying a motion to amend is committed to the sound discretion of the Court and leave to amend will be "freely given" unless there is undue delay, bad faith, or dilatory motive on the part of the movant, undue prejudice to the non-moving party, repeated failure to cure deficiencies by amendment previously allowed or futility of amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962). Allowing amendments which amplify existing pleadings furthers the objectives of the federal rules that cases should be determined on their merits. Wright, Miller & Kane, Federal Practice and Procedure, § 1474 (2001). An amendment that seeks to add a new claim arising out of the

"conduct, transaction or occurrence" set forth in the original pleading will relate back under Rule 15(c). If a proposed amendment is clearly frivolous or advances a defense legally insufficient on its face, the court may deny leave to amend. If the proposed amendment is not clearly futile, then denial of leave to amend is improper. Wright, Miller & Kane, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d, § 1487; *U.S. v. Two Lots*, 30 F.R.D. 5, 7 (E.D. Pa. 1962).

Delay

Defendants argue that plaintiff waited "roughly one year" after the alleged conduct occurred before moving to amend. They claim that they would be prejudiced by the delay. Rule 15 does not establish a time restriction for amending a complaint and motions to amend have been allowed at different stages of litigation. Wright, Miller & Kane, § 1488. The rationale behind the policy is that leave to amend may arise during discovery. *Id.* On the other hand, undue delay has been cited as one reason for denial of an amendment. *Foman v. Davis*, 371 U.S. *at* 182.

This Court finds that the allegations of conduct sought to be added in this case are not untimely. The complaint was originally filed on March 21, 2000. Soon thereafter, defendant HOVIC filed a motion to dismiss. Discovery has been ongoing with both sides propounding interrogatories and requests to produce documentation. Moreover, in support of his request to amend, plaintiff asserts that after filing his complaint with the EEOC, he was subjected to further discrimination, in retaliation for filing and, as a result, he applied for a transfer to a different department. Plaintiff also states that he applied for vacant positions as a Senior Trainer and Senior Safety Manager but he was not hired, and white continentals were. This conduct

allegedly took place as recently as June and September of 2001 and, although plaintiff was promoted in June 2002, he avers that he is still being discriminated against in his pay and benefits.

This conduct forms the basis of the charges sought to be added and, based on the case law, is not untimely. As the Court stated in *Anjelino v. New York Times Co.*, 200 F.3d 73, 96 (3d Cir. 2000), it would be impossible to include charges of retaliatory conduct in the original complaint if such conduct occurs and continues **after** the complaint is filed.

Having said this, an amendment will be denied if the non-moving party establishes that it "was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the ... amendments been timely." *Id.* "Prejudice to the nonmoving party is the touchstone for the denial of the amendment." *Lorenz v. CSX Corp*., 1 F.3d 1406, 1413 (3d Cir. 1993) citing *Cornell & Co., Inc., v. OSHRC,* 573 F.2d 820, 823 (3d Cir.1978). The "prejudice" required to justify denial of a motion to amend a complaint does not mean inconvenience to the other party. Rather, it means that the non-moving party "must show that it was unfairly disadvantaged or deprived of the opportunity to present facts or evidence which it would have offered had the . . . amendments been timely." *Cuffy v. Getty Refining & Marketing Co.*, 684 F.Supp. 802, 806 (D.Del. 1986) *citing Heyl v. Patterson International*, 663 F.2d 426 (3d Cir. 1983). Neither the necessity for defendant to conduct further discovery, nor the fact that the motion was made after the filing of a motion for summary judgment is considered sufficient to establish prejudice. *See Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 569 (3d Cir. 1976)*; Artman v. International Harvester Co.*, 355 F.Supp. 476, 481 (W.D. Pa. 1972). The burden of

showing prejudice is on the asserting party. *Boileau v. Bethlehem Steel Corp.*, 730 F.2d 929, 938 (3d Cir. 1984).

Although defendants claim that they will be prejudiced by the amendment, they have failed to articulate how their ability to present their case would be seriously impaired if the amendment was allowed. Delay alone is an insufficient ground for denial of an amendment. *Howz v. Jones & Laughlin Steel Corp.*, 750 F.2d 1208, 1212 (3d Cir. 1984). Thus, the Court finds that the defendants have not established the type of prejudice which would provide a basis for denial of the requested amendment. *See, Dole v. Arco Chemical Co.*, 921 F.2d 484, 488 (3d Cir. 1990)(Need to redraft a motion for summary judgment and the possibility that some additional discovery will be required are insufficient grounds to deny a motion to amend)*; Cohen v. Cohen*, 98 B.R. 179, 182 (S.D.N.Y. 1989)(Although amendment increases defendant's potential liability in the proceeding, this does not constitute prejudice sufficient for denial).

The Continuing Violations Theory

Defendants also argue that the "continuing violations" theory is inapplicable to the facts of this case. They argue that such allegations assert a claim for future discrimination and is unsupported by precedent. To establish that a claim falls within the continuing violations theory, the plaintiff must do two things. First, he must demonstrate that at least one act occurred within the statutory filing period: "The crucial question is whether any present violation exists." *United Airlines, Inc. v. Evans*, 431 U.S. 553, 558 (1977). Next, the plaintiff must establish that the discrimination is "more than the occurrence of isolated or sporadic acts of intentional discrimination." *Jewett v. International Telephone & Telegraph Corp.*, 653 F.2d 89, 91-92 (3d

Cir.) (citations omitted), *cert. denied,* 454 U.S. 969, 70 L.Ed.2d 386 (1981). The relevant distinction is between the occurrence of isolated, intermittent acts of discrimination and a persistent, on-going pattern. *West v. Philadephia Electronics Co.*, 45 F.3d 744, 754 (3d Cir. 1995) citing *Berry v. Board of Supervisors of Louisiana State Univ.,* 715 F.2d 971, 981 (5th Cir.1983). Once the plaintiff has alleged sufficient facts to support use of the continuing violation theory he may then offer evidence of, and recover for, the entire continuing violation. *West*, 45 F.3d *at* 755. The Court in *Miller v. Beneficial Management Corp.*, 977 F.2d 834, 843 (3d Cir. 1992), acknowledged that claims of discrimination with regard to pay are deemed continuing violations. *See, also, Hall v. Ledex, Inc.*, 669 F.2d 397, 398 (6th Cir.1982). Additionally, continuing violations may be established by showing that the defendant could have promoted plaintiff at any time but failed to do so on more than one occasion. *EEOC v. Hay Associates,* 545 F.Supp. 1064, 1082-83 (E.D.Pa.1982); *Miller*, 977 F.2d *at* 844.

This Court finds that plaintiff has alleged sufficient facts to find a continuing violation on the part of the defendants. Plaintiff's complaint alleges that, beginning in 1998, defendants interviewed him for a position, denied him the position, and hired a white continental. Complaint, ¶¶ 10-13. When a second position became available, for which the plaintiff was qualified, an individual under the age of 40 was hired. ¶¶ 15-16. Plaintiff also alleges that he filed a complaint in March 2000 and as a result, he was denied promotions, fair pay, benefits and opportunities. ¶¶ 20-21. The complaint further alleges that in June 2001 and September 2001, plaintiff applied and was not hired for positions which were later filled by white continentals. ¶ 28-33. Finally, he asserts that in June 2002 he was promoted but learned that a white continental

who is his subordinate, enjoys better benefits. ¶ 38. These facts establish that defendants' conduct was "more than the occurrence of isolated or sporadic acts of intentional discrimination." Thus, the amendment will be allowed.

Scope of the EEOC Charge

Defendants further argue that plaintiff has failed to file an EEOC charge regarding the added allegations.[1] In *Zipes v. Trans World Airways, Inc.*, 455 U.S. 385, 393 (1982), the Supreme Court held that the filing of a charge of discrimination with the EEOC is a condition precedent, "not a jurisdictional prerequisite to filing a Title VII lawsuit, and is subject to waiver as well as tolling when equity so requires." *Accord, Gooding v. Warner Lambert Co.*, 744 F.2d 354, 358 (3d Cir. 1984). In particular, a court may allow an amendment to the original EEOC charge alleging like or related matters that might reasonably be expected to grow out of the charge. *Flesch v. Eastern Pennsylvania Psychiatric Institute,* 434 F.Supp. 963, 970 (E.D.Pa. 1977); *Hicks v. ABT Assoc. Inc.*, 572 F.2d 960, 965 (3d Cir.1978)("[T]he scope of the original charge should be liberally construed"); *Ostapowicz v. Johnson Bronze Co.*, 541 F.2d 394, 398-99 (3d Cir.1976)(The "parameters of a civil action in the District Court are defined by the scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination, including new acts which occurred during the pendency of proceedings before the Commission").

CONCLUSION

[1]In Plaintiff's Reply Plaintiff asserts that he has filed such charge and is awaiting his Right-To-Sue letter. (Exhibits "1" and "4" to Plaintiff's Reply).

Here, plaintiff alleges that he was first discriminated against in 1998 on the basis of his race, age, and national origin. The additional allegations of retaliation are related to and would reasonably have been part of the EEOC investigation. Accordingly, these facts may form part of a motion to amend without offending notions of fair play. Granting the plaintiff's motion comports with the policy favoring liberal amendments, judicial economy and the resolution of claims on their merits. In any event, the ultimate efficacy of such pleading is better determined on any dispositive motion addressed thereto fully briefed and for consideration by the District Judge.

Now, therefore, it is hereby

ORDERED that the plaintiff's motion to amend his complaint is GRANTED.

DATED: September 24, 2002

ENTER:

_____
JEFFREY L. RESNICK
U.S. MAGISTRATE JUDGE

A T T E S T:
Wilfredo F. Morales, Clerk of Court
by:_____
Deputy Clerk

cc: Lee Rohn, Esq.
Beth Moss, Esq.